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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 902

TRAVEL CONSULTANTS, INC., *Petitioner*,

v.

TRAVEL MANAGEMENT CORP., *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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STATEMENT OF THE CASE

For an accurate and unvarnished statement of the case, without distortion of substance or chronology, reference is made to the first three and one-half pages of the opinion below (Pet. App. A, pp. 1a-4a).[1]

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[1] The terms, conditions and purposes of the two contracts between the parties appear in the contracts themselves (R6, 17). The employment agreement between respondent and Mr. Nyhus appears at R22. As to the Stock Purchase Agreement, the substantive dispute appears in the pleadings below (R3, 14); as to the Sales Agreement, the substantive dispute appears in respondent's demand filed with the American Arbitration Association (R29) and in petitioner's disputed counterclaim filed in the District Court (R15, 31).

The Alleged "Questions Presented" Are Fictitious

The petition recites four questions which it claims are presented in this case (Pet., p. 2); but all four are fictitious.

1. Whether the question of arbitrability may be referred by the District Court to the arbitrator is not involved. Here, both parties moved the court to determine the question of arbitrability, and the court made that determination (R. 32, 33, 42). It held that the controversies and claims under the Sales Agreement are referable to arbitration (R. 44).

2. Whether a breach of contract constitutes a default in proceeding with arbitration under § 3 of the Arbitration Act is a question likewise not presented. Contrary to petitioner's assertion, the merits of the conflicting claims under the Sales Agreement remain unresolved. Respondent still seeks to determine its claim through arbitration, petitioner through litigation (R. 29, 16-17). It is indisputable that there was no default in proceeding with arbitration. Petitioner itself alleged respondent's timely institution of the proceeding (R. 16, 29); and the District Court specifically found that respondent was "not in default in proceeding with arbitration under the Sales Agreement" (R. 43).

3. Whether the District Court may stay litigation of a contract pending arbitration, without determining whether grounds exist for revocation of the arbitration provision, is another question that is not involved. Here, no grounds have ever been asserted for revocation of the Sales Agreement or its arbitration provision. The execution and terms of the agreement are undisputed (R. 15, 17, 31). Nor is there any dispute as to its validity; both parties seek to enforce it, re-

spondent through the prescribed arbitration, petitioner through attempted litigation of its counterclaim (R. 19, 16-17).

4. The question whether the District Court should enjoin arbitration, when identical controlling issues are pending in an action before the court, is misleading. The only claims filed in arbitration were those relating to non-performance of the Sales Agreement (R. 29), whereas the pleadings in court relate primarily to the Stock Purchase Agreement (R. 3, 14). Only petitioner's "Second Defense and Counterclaim" attempts to litigate issues arising under the Sales Agreement (R. 15), and only those issues were held referable to arbitration (R. 42, Pet. App. A, pp. 7a-8a).

It is significant that nowhere in the body of the petition is any argument addressed directly to any of the alleged "questions presented".

The real question involved is whether petitioner's disputed claim under the Sales Agreement was properly held to be referable to arbitration. Petitioner's attempt to obtain a court determination on the merits, in disregard of the arbitration clause, was properly rejected by the courts below. The Circuit Court unanimously held (Pet., App. A, p. 7a):

> "The issues raised by the counterclaim are committed to arbitration by the arbitration clause of the Sales Agreement. That clause, set out above, is extremely broad, covering 'any controversy or claim arising out of, or in connection with this Agreement *or the breach thereof.*' (Emphasis added.) We so no reason for reading into the simultaneously executed Stock Agreement, which contains no arbitration clause, any qualification upon the parties' obligation to arbitrate disputes under the Sales Agreement. Whether the agree-

ments are independent or interdependent is immaterial for purposes of determining whether Consultants was bound to arbitrate its claims under the Sales Agreement. Consultants cannot escape the effect of the arbitration clause by arguing that the Sales Agreement questions are affected by issues under the Employment Agreement, or that the arbitration of the Sales Agreement questions will affect the resolution of issues in the litigation under the Stock Purchase Agreement.[2]

If, by alleging a breach of contract in a court action, a party could evade the arbitration clause of the contract, as petitioner seems to contend, the Arbitration Act and arbitration agreements generally would be reduced to a virtual nullity.

The Asserted Reasons for Granting the Writ Are Without Merit

1. Contrary to petitioner's assertion, the decision below does not conflict with controlling decisions of this Court; it follows those decisions. Where, as in petitioner's "Second Defense and Counterclaim", the claim on its face appears to be subject to the arbitration agreement, the court's sole function is to make that determination, stay litigation thereon and order

[2] As to petitioner's claim that arbitration under the Sales Agreement and litigation under the Stock Purchase Agreement subject it to "double litigation" the unanimous court below held (Pet., App. A, p. 8a):

> "Consultants complains of the burden of pursuing two actions concurrently in two different forums, and asks for a ruling that either all or none of the actions be referred to arbitration. That burden falls on Consultants because it signed two different agreements with the same party, one requiring arbitration, and the other containing no arbitration provision. Consultants shouldered that burden voluntarily, and we see no basis for judicial interposition."

arbitration. *United Steel Workers* v. *American Mfg. Co.,* 363 U.S. 564 (1960). This Court held at page 567:

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. *It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.* Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for." (Emphasis supplied)

Justice Brennan, concurring, stated at page 571:

> "With that finding [that the arbitration clause commits the dispute to arbitration] the court will have exhausted its function, except to order the reluctant party to arbitration."

Moreover, this Court has held that a party may not evade arbitration, as petitioner attempts, by claiming a breach of contract by the moving party. In *Drake Bakeries, Inc.* v. *Local 50,* 370 U.S. 254, 262 (1962), this Court rejected the contention that a strike by the union excused the company from arbitrating, "upon theories of waiver, estoppel, or otherwise".

The decision below is in no way inconsistent with the Supreme Court cases cited by petitioner. *John Wiley & Sons, Inc.* v. *Livingston,* 376 U.S. 543 (1964) at 546-547 merely held that the court rather than the arbitrator was to decide whether an arbitration clause in a collective bargaining agreement was binding on a successor company (by merger) which had not

signed the agreement. The successor company was held bound, thus resolving the question of arbitrability. No court heard evidence on the merits of the disputes, and this Court's unanimous opinion held at page 555:

> "Whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts."

Atkinson v. *Sinclair Refining Co.*, 370 U.S. 238 (1962) at 241 held that, in view of the peculiar arbitration clause, it was for the court to determine whether the company "had agreed to arbitrate disputes of a particular kind." (See *John Wiley & Sons, Inc.* v. *Livingston, supra,* 376 U.S. at 547.)

Petitioner pretends that the courts below did not determine the question of arbitrability presented by the cross-motions; but that is the very question they did determine. They held that issues under the Sales Agreement, sought to be litigated by petitioner's "Second Defense and Counterclaim," are referable to arbitration.

2. Contrary to petitioner's assertion, the decision below does not conflict with *Cuneo Press, Inc.* v. *Kokomo Paper Handlers' Union,* 235 F. 2d 108 (C.A. 7, 1956). There the union went on a sit-down strike in violation of a no-strike clause and ignored the prescribed grievance and arbitration procedures until after the company had filed its court action. The court held that the union was "in default in proceeding with such arbitration" under § 3 of the Arbitration Act and that the strike had defeated the whole purpose of the arbitration clause leaving no issues referable to arbitration. No such circumstances exist here. Furthermore, insofar as the rationale of *Cuneo* related to the

effect of the strike as a breach, it was squarely rejected by this Court in *Drake Bakeries, Inc.* v. *Local 50, supra,* 370 U.S. at 262.

3. The decision below is not in conflict with *El Hoss Engineering & Transport Co., Ltd.* v. *American Independent Oil Co.,* 289 F. 2d 346 (C.A. 2, 1961). There the arbitration clause was conditioned on prior performance of specified conditions, and the contract showed "a clear intent . . . not to arbitrate any dispute with reference to whether there was a full performance of these threshold conditions." (289 F. 2d at 350.) Here, the arbitration clause is unconditional, and the question of arbitrability involves no such threshold issue.

4. The decision below does not conflict with *Leesona Corp.* v. *Cotwool Mfg. Corp.,* 315 F. 2d 538 (C.A. 4, 1963). The circumstances in that case were unique and materially different from those presented here. Leesona Corp., a patent holder, brought an infringment action against three defendants in the District Court for South Carolina. One of them, Whitin, before being made a defendant, had brought suit against Leesona in the District Court for Massachusetts, seeking a declaratory judgment that Leesona's patents were invalid. The South Carolina court transferred the action as against Whitin to the Massachusetts court and stayed its own proceedings against the other two defendants. None of the three defendants had any contractual relation, let alone any arbitration agreement, with Leesona. After its suit in South Carolina had been pending for more than one year, Leesona instituted arbitration proceedings against still a fourth party, Huber, with whom it had a license agreement containing an arbitration clause. The South Carolina court stayed

the arbitration, pending decision in Massachusetts. Upholding the stay as a reasonable exercise of the court's discretionary equity power, the Fourth Circuit court stressed three basic points which clearly distinguish the case: 1) The arbitration threatened irreparable injury to the others, who were never parties to the arbitration agreement. 2) In patent cases it is a well established practice to stay proceedings in one tribunal pending decision in another on the validity of the patent. 3) By waiting more than one year, Leesona was in default in proceeding with the arbitration.

Petitioner quotes out of context a sentence from the concurring opinion in *Moseley* v. *Electronic & Missile Facilities, Inc.*, 374 U.S. 167, 172 (1963) (Pet. 14). There a subcontractor sued the prime contractor in the District Court for Georgia under the Miller Act, which requires such actions to be brought in the District where the work is performed. The subcontractor contended that an arbitration clause calling for arbitration in New York had been induced by the defendant's fraud. This Court held that the District Court should proceed to trial on the allegation of fraud, which went "to the arbitration clause itself". Here, the issue of arbitrability has never involved any question whatever of fraud. The concurring opinion in *Mosley* simply noted that the Court's disposition left open important questions as to the applicability, effect and constitutionality of the Arbitration Act in relation to rights and remedies under the Miller Act. No such questions are involved here. This Court long ago upheld the Arbitration Act provisions for enforcement of arbitration agreements generally, as it has unanimously done in the later case of *John Wiley & Sons, Inc.* v. *Livingston, supra* (1964).

5. Contrary to petitioner's assertion (Pet. 15), respondent below did not rely principally on *Robert Lawrence Co., Inc.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (C.A. 2, 1959). Respondent relied chiefly on *United Steel Workers* v. *American Mfg. Co., supra,* and *Drake Bakeries, Inc.* v. *Local 50, supra. Robert Lawrence* presented questions as to whether an arbitration could be enforced (1) despite a claim of fraud and (2) despite a claim of rescission, independent of fraud. As noted above, there is no issue of fraud here; nor is there any issue of rescission. *Robert Lawrence* was cited below for the view that an arbitration agreement cannot be evaded even by a claim of rescission. In short, no question left open by this Court's dismissal of the petition in *Robert Lawrence* has any application here.

CONCLUSION

Respondent instituted the arbitration proceeding August 3, 1965, seeking speedy resolution of the issues of non-performance under the Sales Agreement. Petitioner's attempts through litigation and relitigation to evade "the forum it agreed to use . . ." (*Drake Bakeries, supra,* at 266) have delayed the arbitation for almost 1½ years. The courts below unanimously rejected such attempts. No reason is presented to warant further review or delay.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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